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Successful Medicaid Planning under the DRA: a First Look

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Part 1 – The New Paradigm

1.0 A New Era for Medicaid Planning

The Deficit Reduction Act of 2005 (the “DRA”) was enacted on February 8, 2006 and includes significant changes to Medicaid planning for long-term care needs of seniors. The stated goal of the legislation was to save money. It is certainly quite clear that any money saved will be at the expense of health care for poor and middle class seniors. Even then the savings might well be an illusion. Nursing homes will be stuck with those non-paying residents they have not managed to send to hospitals. In turn, hospitals will likely demand Medicare reimbursements for patients that otherwise would reside in a SNF.

But one thing has not changed. Seniors continue to need long-term care and Medicaid remains a critical component of the long-term care system. So, the obvious question becomes: “How does one plan under the new DRA rules?”

It is still early days for the DRA. The effects of the changes and the creation of new planning strategies will unfold in the coming months. Indeed, it is possible that rules will change again: after all, the DRA passed by the slimmest of margins in the Congress.

1.1 What Elder Law Attorneys Need to Do Differently for Their Clients

Elder law is a practice that combines human and technical skills to help seniors plan effectively. Medicaid planning has always been easier when it starts early: but the reality is that much of what we do is done in crisis situations. Often one spouse is already in the nursing home, or on the way.

Under the DRA, the new 5-year look back period and changes in the penalty beginning date puts additional planning pressure on the lawyer and client. Changes in annuity rules, promissory notes and, to a lesser extent, limits on home equity, reduce some planning options.

The days of transferring assets and waiting three years for Medicaid eligibility or transferring half and retaining half to pay for care are gone. Elder Law attorneys will need a much higher level of expertise than in the past. MPS will assist Elder Law attorneys in acquiring and implementing that expertise.

1.2 What Elder Law Attorneys Need to Tell Their Clients About the Effects of the DRA

Elder Law Attorneys will need to tell their clients to begin to plan earlier. They need to stress the fact that the days of the three-year lookback and half-a-loaf transfers are over. Client’s expectations need to be managed so that in many cases they may settle for less and in virtually all cases the process of attaining any savings will be more sophisticated. Clients need to be prepared for higher fees.

1.3 Effects of the DRA on Your Practice

The DRA will likely have significant impact on the practice of every elder law attorney. The following items should be considered:

- *Business Model.* The nature and manner in which services are delivered will be altered significantly. Elder law attorneys need to look at their business model to make the necessary adjustments.
- *Engagement Letters.* Review engagement letters with a view toward making them comply with the new business model.
- *Asset Protection Plans.* Because of changes in the law, the elimination of certain strategies and the availability of new strategies, it is important to review and revise Asset Protection Plans. The Asset Protection Plans (Married and Single) in the MPS 2006-Version (April Build) have been thoroughly revised and updated for the DRA to handle new calculations (lookback, ineligibility periods) and a number of new planning techniques. As the impact of the DRA unfolds and the elder law bar develops additional planning approaches, more changes are likely in the Asset Protection Plan.
- *Documents and Forms.* The implementation of new strategies under the DRA will involve the need to revise existing forms or draft new forms. This process has begun with updates in the MPS 2006-Version (April Build), but it certainly will continue as the impact of the DRA unfolds and the elder law bar develops additional planning approaches. A speculative list of documents affected by the DRA might include: Care Agreements, Non-Negotiable Promissory Notes, Deeds for Life Estates, Riders for Annuities, Calculation Forms for Expansion of Community Spouse Resource Allowance, Private Reverse Mortgages from Children to Parents, and Grantor Trusts.
- *Decision Trees.* Because of the changes in the law and the elimination of certain strategies and the availability of new strategies, it will be important to review and revise Decision Trees. Updated Decision Trees are included in the MPS 2006-Version (April Build), but there may well be further changes as the impact of the DRA unfolds and the elder law bar develops additional planning approaches.
- *Planning Fees.* It is likely that law firms will provide considerably less follow-through to clients in many instances. Fees must be adjusted accordingly. It is also likely that in many situations planning will be far more complex. Fees must be adjusted to reflect that reality.

Part 2 – The New Law

2.0 Introduction

Major changes to Medicaid planning have been made by provisions of the Deficit Reduction Act of 2005 (popularly known as the “DRA”). The law was signed by President Bush on February 8, 2006. The new statute is known as Public Law 109-171 (s) 6001 and is codified at 42 U.S.C. (s) 1396r-8. For the actual statutory text go to:

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ171.109

Most of the major Medicaid provisions of The Deficit Reduction Act of 2005 (DRA) are included in §§ 6011 through 6016:

- Lengthening the Lookback Period (§6011)
- Change in Beginning Date for Period of Ineligibility (§6011)
- Hardship Waivers (§6011)
- Disclosure and Treatment of Annuities (§6012)
- Income First Rule (now required for all states) (§6013)
- Home Equity (disqualification based on substantial home equity) (§6014)
- Transfer Restrictions in CCRC contracts (§6015)
- Additional reforms of Medicaid asset transfer rules

Each of the changes is discussed below.

Effective date of the DRA changes: Most provisions of the DRA became effective on February 8, 2006. In so-called “pass through” states, the DRA is automatically effective. In these states, the new law applies to transfers made on or after the date of enactment: February 8, 2006.

All other states, however, will need to enact new legislation to conform to the Federal law. The DRA requires that such legislation be enacted “before the first day of the first calendar quarter beginning after the close of the first regular session of the state legislature that begins after the date of the enactment of the act (§6016(e)).”

The law does not apply to transfers made prior to February 8, 2006.

States are likely to vary in their legislation and regulations as to whether the state action will be retroactive to that date.

2.1 § 6011 - Lengthening Lookback Period; Change in Beginning Date for Period of Ineligibility

2.1.1. Lookback. The lookback period is extended to 5 years.

2.1.2. Beginning Date. The beginning date of the period of ineligibility has changed from the date the transfer was made to the later of the date of the transfer was made or the date the individual:

- would be eligible for medical assistance; and
- would otherwise be receiving institutional level care based on an approved application for such care, but for the application of the penalty period, whichever is later; and
- which does not occur during any other period of ineligibility.

2.2 Hardship Waivers Each state must provide a hardship waiver process for situations when application of the transfer of assets penalty would deprive the individual of:

- *Medical Care.* Such that the individual's health or life would be endangered; or
- *Necessities.* Food, clothing, shelter and other necessities of life; and
- *Notice.* The state must provide notice to recipients that an undue hardship exception exists.
- *Process.* There must be a timely process for determining whether an undue hardship will be granted.
- *Appeals.* A process under which an adverse determination can be appealed.
- *Waiver.* Either the individual or the facility may apply for the hardship waiver.
- *Bed Holds.* The state is authorized to pay for nursing facility services to hold a bed for a period not in excess of 30 days while an application for a hardship waiver is pending.

2.3 § 6012 Disclosure & Treatment of Annuities

2.3.1 Disclosure of Annuities

2.3.1.1 Disclosure At the time of a Medicaid application or re-certification of eligibility the applicant must disclose a description of any interest the individual or community spouse has in an annuity. The applicant or re-certification must include a statement that the state becomes a remainder beneficiary under such an annuity.

2.3.1.2 Notice The state shall notify the issuer of the annuity of the right of the state as preferred remainder beneficiary.

2.3.1.3 Change in Amount. The state may require the issuer to notify the state when there is a change in the amount of income or principal being withdrawn.

2.3.1.4 Guidance The Secretary may provide guidance to states in categories of transactions that may be treated as a transfer of assets for less than fair market value.

2.3.1.5 Denial of Eligibility Nothing in the subsection pertaining to disclosures of income and resources derived from an annuity shall be construed as preventing a state from denying eligibility based on income or resources derived from the annuity.

2.3.2 Treatment of Annuities

2.3.2.1 State Named as Beneficiary Transfer of an annuity shall be treated as a transfer of assets for less than fair market value unless:

- *Remainder Beneficiary.* The state is named as remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant; or
- *Second Position.* The state is named as a beneficiary in the second position after the community spouse or minor or disabled child and is named in first position if such spouse or a representative of such child disposes of any remainder for less than fair market value.

2.3.2.2 Design of Annuity. Annuities are not subject to the transfer of assets provisions if:

- it is owned by IRA or purchased with the proceeds from an IRA, an SEP, or a Roth IRA; or
- the annuity is:

- irrevocable
- non-assignable
- actuarially sound as determined in accordance with the actuarial publications of the Office of Chief Actuary of the Social Security Administration*; *and*
- provides for payments in equal amounts during the term of the annuity with no deferral and no balloon payment.

***NOTE:** The **SSA Period Life Table (October 4, 2005)** is available on the MPS CD-OM and at:

<http://www.ssa.gov/OACT/STATS/table4c6.html>

2.3.2.3 Effective Date The amendments apply to transactions after the date of enactment.

2.4 § 6013 Income First Rule

States must follow the income first rule when calculating an expansion of the Community Spouse Resource Allowance.

2.5 § 6014 Home Equity

2.5.1 Limits A person is ineligible for Medicaid if he has equity in the home in excess of \$500,000 or at state option \$750,000. This number is indexed for inflation.

EXCEPTION: The maximum amount does not apply if the home is occupied by:

- spouse
- child under age 21
- child who is blind or permanently and totally disabled

2.5.2 Loan The applicant is encouraged by the Act to obtain a reverse mortgage or home equity loan to reduce equity.

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2.6 § 6015 CCRC Contracts

2.6.1 Transfer Provisions Provisions in CCRC contracts restricting transfers of assets are enforceable.

2.6.2 Entrance Fees Entrances fees are countable assets if:

- the contract provides that the entrance fee may be used for care; or
- the individual is eligible for a refund; and
- the entrance fee does not confer an ownership interest.

2.7 § 6016 Additional Reforms of Medicaid Asset Transfer Rules

2.7.1 Partial Month Penalties Partial month penalties are mandated.

2.7.2 Accumulation of Multiple Transfers

- Fractional transfers of assets in more than one month are accumulated.
- Transfers during all months are treated as one transfer.

2.7.3 Notes and Other Loan Assets. For transfer of assets purposes promissory notes, loans and mortgages are included unless:

- they include an actuarially-sound repayment term as calculated by the Office of the Chief Actuary of the Social Security Administration; and
- payments are made in equal amounts with no deferral or balloon payment; and
- the document prohibits the cancellation of the balance upon the death of the lender.

2.7.4 Purchase of Life Estates. The purchase of a life estate is not considered to be a transfer of assets if the purchaser resides in the home for a period of at least one year.

Part 3 – Medicaid Planning Techniques under the DRA

3.0 Introduction

The elder lawyer attorney has always had a long list of planning techniques at his or her disposal. The DRA does not systematically address every possible technique on this list. And, like all major legislation, the DRA both takes away and creates planning opportunities.

Some techniques we have used for years are no longer available at all. Traditional half-a-loaf transfers are completely gone, for example (but see a twist below).

Some techniques are available, but their use may be limited in many circumstances. “Transfer and wait” (through the lookback period) is now a 5-year proposition, which probably makes it even less realistic in the real world.

Some techniques remain available, especially as modified to conform to the DRA. Among others, this includes various transfers to children, and the use of annuities.

This Part includes a basic review of all of the above. Again, it is early days for the DRA; all of the following must be viewed and assessed accordingly.

3.1 Planning Opportunities That Clearly Have Been Eliminated by the DRA

Opportunities that have been eliminated include the following:

- Transfer Assets/Wait Three Years – the look back period is now 5 years.
- Half-a-Loaf Transfer – the new rule on ineligibility makes this impossible
- Monthly Transfers - the new rule on ineligibility makes this impossible
- Transfer within a Penalty Period - the new rule on ineligibility makes this impossible
- Transfers from Retirement Plans within a Penalty Period - the new rule on ineligibility makes this impossible
- SCIN - By definition a SCIN is a loan that cancels on the death of the lender, so it is now prohibited by the new annuity rules in §6061(c)

3.2 New Planning Opportunities Under the DRA

The viability of any of the new planning opportunities discussed in this section remains uncertain since they are all new and none have been tested.

3.2.1 Reverse Half-a-Loaf Under this strategy the parent transfers assets, immediately applies for Medicaid, and is rejected. The child then retransfers roughly half the assets to the parent. The parent reapplies and is rejected because of the remaining outstanding transfer. The parent pays for that period of ineligibility from the retransferred funds.

EXAMPLE: A parent transfers \$60,000 to a child and immediately applies for Medicaid and is rejected because of a transfer penalty of 12 months.

÷	\$60,000	Amount Transferred
	5,000	Average Cost of NJ Nursing Home
	12	Months

The child then retransfers \$30,000 to the parent. The parent again applies for Medicaid. Now the penalty is 6 months.

÷	\$30,000	Amount Transferred
	5,000	Average Cost of NJ Nursing Home
	6	Months

The nursing home costs \$5,000 plus the parent's other income, the parent would then use the retransferred funds to pay for care.

PRACTICE TIP: This strategy will not work in a state that does not permit a partial cure. State law must be consulted. In states that do permit a partial cure, the strategy is new and untested.

HCFA Transmittal 64 permits partial cures.²

3.2.2 Large Transfer

²HCFA Transmittal 64 § 3258.10 C 3.

3.2.2.1 Transfer Less Care Expense Set aside sufficient funds to pay for 5 years of care and transfer the balance to children.

PRACTICE TIP: Include an inflation factor for care.

3.2.2.2 Medical Deduction A variation of this strategy is to transfer virtually all of the assets to the children and let the children pay for the parent's care for 5 years or any portion thereof remaining and claim the parent as a medical dependent on the child's income tax return.

3.2.2.3 Grantor Trusts Use Grantor Trusts more frequently. Trusts will reduce the risk that funds will be lost by children with creditor problems, divorce problems or children who simply misappropriate the money. The Trust also would not affect a grandchild's ability to obtain financial aid for college. There may be significant tax advantages in many situations including a step-up in basis on appreciated assets. Another advantage of the Grantor Trust as opposed to transfers to children is the income would be taxed to the parent who is usually retired rather than the child who is usually working in a higher income tax bracket.

- Fund trust with client's home and other appreciated assets.
- Grantor trust for income tax purposes.

PRACTICE TIP: Advise clients concerning:

- New transfer of assets rules
- Retain five years of record
- Advantages of Grantor Trusts

3.2.3 Home Care or Assisted Living Transfer the funds and obtain home care or assisted living for the parent. The cost of the 5 years would be less than the cost of a nursing home, so less money needs to be set aside for the parent's care.

3.2.4 Improve Investment Returns Many seniors have lazy money. It may be invested in certificates of deposit or in growth stocks producing little income. A better asset allocation and better investments may increase the ability of the individual to pay for care. Work with a financial advisor and maximize financial investment returns.

3.2.5 Buy Long-Term Care Insurance for a 5-Year Period Healthy clients could buy long-term care insurance for a period of 5 years. If they need long-term care in the future, they could transfer their assets at that time and wait out the 5-year lookback through the use of long-term care insurance.

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3.2.6 Annuities Under the DRA, annuities are exempt from asset transfer penalties under these conditions:

- the annuity is irrevocable; and
- non-assignable; and
- actuarially sound; and
- payments in equal amounts with no deferral and no balloon payment; and
- the state is named as primary beneficiary; or
- the state is named as secondary beneficiary after the community spouse or minor or disabled child unless such spouse or child disposes of any remainder for less than fair market value.

OR

- the annuity is purchased with a retirement account.

PRACTICE TIP: Make sure that there is an irrevocable designation of payee, and beneficiary and that the annuity contract has been approved by [the Department of Banking and Insurance](#), so that the annuity is not saleable on the secondary market.

PRACTICE TIP: Purchase annuities for the community spouse using the community spouse's IRA.

CAVEAT: North Dakota and New Jersey maintain that annuities are saleable on the secondary market and, therefore, have a value and are a countable asset. DRA exempts the purchase of an annuity from the transfer asset provisions but does not address the issue as to whether or not the asset is countable. Other states may begin to adopt the North Dakota and New Jersey rule.

3.2.7 Income First Rule (*Robbins v. DeBuono*) In *Robbins v. DeBuono*³ the court held that Social Security is not assignable. In cases involving the expansion of the Community Spouse Resource Allowance (CSRA), significantly more money can be protected if Social Security is not included in the calculation. Other states have not followed Robbins.

³*Robbins v. DeBuono*, 218 F3d 197 (2d Cir. 2000).

3.2.8 Buy a More Expensive Home This strategy has always been available, but may be more appealing now because of the lack of ability to easily transfer funds. A home of any value could be purchased by a community spouse. A more expensive home does not necessarily have to be a larger home. The client may move from a large home in a poor neighborhood to a condominium in an upscale neighborhood.

The \$500,000 equity limit in homes will have little affect in most states, except in cases where the individual is receiving home care, because it does not apply to a home occupied by a Community Spouse or a minor child or a child of any age blind or disabled. In the case of a single person, most states require that the home be sold or at a minimum include the home in estate recovery so that the equity value of the home is insignificant.

3.2.9 Give up Cash, Protect the Home This is the reverse of what often has been done in the past. This strategy would be to transfer the home in an effort to protect it, particularly if the equity exceeds the permitted limits and to retain the cash to pay for care during the lookback period. Variations with this strategy would deal with situations where there was crisis and non-crisis planning.

3.2.10 Use a Non-Negotiable Promissory Note A Non-Negotiable Promissory Note document has been added to the MPS 2006-Version (April Build) for your convenience. In this technique, you transfer assets from the community spouse to children in exchange for a promissory note to the community spouse. The Non-Negotiable Promissory Note must be:

- actuarially sound
- payable in equal installments
- bear a market rate of interest
- not include a clause permitting cancellation of the indebtedness upon the death of the lender.

PRACTICE TIP: The note should:

- contain a provision that it is non-assignable so that there can be no argument that there is a secondary market; and
- prohibit prepayment to foreclose any argument concerning availability.
- bear a market rate of interest
- be payable in equal monthly installments

Under the DRA a promissory note can be structured in such a way to avoid application of the transfer of assets penalties. The issue remains as to whether the note is a countable asset.

CAVEAT: State agencies may argue that promissory notes are saleable on the secondary market. If so, the note would be considered a countable asset. Even if the note were non-assignable under its terms, an argument may be made that a third party would make a payment to the lender in exchange for the lender's promise to make payments to the third party after payments are received from the borrower.

3.2.12 Purchase a Life Estate In many instances a parent moves into the home of a child and lives there for the rest of the parent's life. Typically, the institutionalized spouse goes to a facility, and the community spouse moves in with a child. As long as the community spouse lives there for one year, the community spouse could purchase the life estate from the child. The same strategy would apply to an individual who may live with a child for a period of time and then have to move to a nursing home.

- May be used for single client.
- Capital gains tax consequences. It would appear that the sale of the life estate from the parent to the child would be subject to the child's § 121 exclusion if the child is occupying the residence as his home and satisfies the holding period⁴. If the property is sold during the parent's lifetime, the parent should have the ability to use the §121 exclusion for funds received by virtue of his sale of the life estate.
- Due on sale clause. The Garn-St. Germain Act applies to transfers of "an interest" in real estate and makes an exception only for transfers to spouses and children.⁵
- Step up. If the parent dies, the child will not receive a step up in basis since a the life estate was not a retained interested but was purchased.

3.2.13 Divorce

- *Equitable Distribution*. It is likely that more couples will be divorced so that the community spouse receives equitable distribution, which may exceed the Community Spouse Resource Allowance.

⁴R.U.V. Rul 71-122 & F.T.C. 1-29.17

⁵12 U.S.C. § 1701 J-3.

- *Alimony*. It may be possible for the community spouse to obtain alimony that may exceed the Minimum Monthly Maintenance Needs Allowance (MMMNA).
- *Arm's Length*. The divorce must arm's length, each party must be represented by separate counsel and the agreement must be on the record and approved by a court after testimony.
- *QDRO*. Consider a QDRO if retirement funds are being transferred from the institutionalized spouse to the community spouse.

3.2.14 Care Agreements Children often provide significant care to parents. It is possible to compensate the children for such care. There must be a Care Agreement. The Care Agreement must be in writing, must be prospective in nature and the compensation must be reasonable. This may arise in several different situations:

- *Parent's Home*. Sometimes the child moves into the parent's home and provides the care there.
- *Child's Home*. Sometimes the parent moves to the child's home and receives care there.
- *Separate Residences*. In certain instances the parent and child live separately, but the child provides certain services to the parent.
- *Direct Care*. Child provides care.
- *Care Coordination*. Child coordinates or manages the delivery of services to parent.
- *Single Clients*. May be used for single clients.
- *Taxable Income*. Income taxable to child.
- *SS and Medicare Withholding*. Child receives \$1,500 + per year.
- *FUTA Withholding*. Child receives \$1,000 or more in any calendar quarter.
- *Federal Income Tax*. Withholding not required absent agreement.
- *Value of Services*. Document value of services.

3.3 Relevant Effective Date and Planning

There is considerable confusion as to the effective date of the new rules. The effective date could be:

- the date of enactment of the Deficit Reduction Act of 2005

- the date of the adoption by the state of implementing legislation
- the date of adoption by the state of implementing regulations

PRACTICE TIP: Any new state statute and/or regulations are likely to be effective retroactive to the date of the federal legislation.

Small transfers until the date of the enactment of any new state statute or regulation may be a viable strategy, but only if the client will be eligible for and has applied for Medicaid before the state enacts new statutes and/or regulations.

- *Medicaid Application Fees.* Medicaid applications may become more complex with the requirement to submit 5 years of records. These actions are likely to be scrutinized more carefully and fees for applications may need to be adjusted.
- *Fair Hearing Fees.* There are likely to be a dramatic increase in the number of Fair Hearings as a Medicaid agency resists new planning techniques and the number of hardship waivers are likely to increase dramatically. To represent a client properly at a Fair Hearing the attorney must know their facts, engage in discovery, interview and prepare witnesses, and prepare briefs as well as arguing the case before the Administrative Law Judge. Objections may need to be filed. Since there will be a considerable amount of time spent, engagement letters should be designed and fees should be established.
- *Consultation Fees.* It is likely that very little can be done for many clients, particularly single people. Clients will also call for appointments believing that asset transfers are still possible and will be disappointed to learn otherwise. As a result many clients will decide to do little or no work. Consultation fees may need to be adjusted to reflect this reality.
- *“D” Clients.* Develop a screening mechanism to screen out “D” clients. This will be particularly important with respect to single clients.

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Appendix: The Deficit Reduction Act of 2005 [Public Law 109-171 (s) 6001(b)(1)]

This text was taken from the Internet at:

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ171.109

CHAPTER 2--LONG-TERM CARE UNDER MEDICAID

Subchapter A--Reform of Asset Transfer Rules

SEC. 6011. LENGTHENING LOOK-BACK PERIOD; CHANGE IN BEGINNING DATE FOR PERIOD OF INELIGIBILITY.

(a) Lengthening Look-Back Period for All Disposals to 5 Years.--Section 1917(c)(1)(B)(i) of the Social Security Act (42 U.S.C. 1396p(c)(1)(B)(i)) is amended by inserting ``or in the case of any other disposal of assets made on or after the date of the enactment of the Deficit Reduction Act of 2005'' before `` , 60 months''.

(b) Change in Beginning Date for Period of Ineligibility.--Section 1917(c)(1)(D) of such Act (42 U.S.C. 1396p(c)(1)(D)) is amended--

- (1) by striking ``(D) The date'' and inserting ``(D)(i) In the case of a transfer of asset made before the date of the enactment of the Deficit Reduction Act of 2005, the date''; and
- (2) by adding at the end the following new clause:

``(ii) In the case of a transfer of asset made on or after the date of the enactment of the Deficit Reduction Act of 2005, the date specified in this subparagraph is the first day of a month

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during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.''

(c) <<NOTE: 42 USC 1396p note.>> Effective Date.--The amendments made by this section shall apply to transfers made on or after the date of the enactment of this Act.

(d) <<NOTE: 42 USC 1396p note.>> Availability of Hardship Waivers.--Each State shall provide for a hardship waiver process in accordance with section 1917(c)(2)(D) of the Social Security Act (42 U.S.C. 1396p(c)(2)(D))--

- (1) under which an undue hardship exists when application of the transfer of assets provision would deprive the individual--
 - (A) of medical care such that the individual's health or life would be endangered; or
 - (B) of food, clothing, shelter, or other necessities of life; and

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- (2) which provides for--
 - (A) notice to recipients that an undue hardship exception exists;
 - (B) a timely process for determining whether an undue hardship waiver will be granted; and
 - (C) a process under which an adverse determination can be appealed.

(e) Additional Provisions on Hardship Waivers.--

- (1) Application by facility.--Section 1917(c)(2) of the

Social Security Act (42 U.S.C. 1396p(c)(2)) is amended--

(A) by striking the semicolon at the end of subparagraph (D) and inserting a period; and

(B) by adding after and below such subparagraph the following:

``The procedures established under subparagraph (D) shall permit the facility in which the institutionalized individual is residing to file an undue hardship waiver application on behalf of the individual with the consent of the individual or the personal representative of the individual.''.

(2) Authority to make bed hold payments for hardship applicants.--Such section is further amended by adding at the end the following: ``While an application for an undue hardship waiver is pending under subparagraph (D) in the case of an individual who is a resident of a nursing facility, if the application meets such criteria as the Secretary specifies, the State may provide for payments for nursing facility services in order to hold the bed for the individual at the facility, but not in excess of payments for 30 days.''.

SEC. 6012. DISCLOSURE AND TREATMENT OF ANNUITIES.

(a) In General.--Section 1917 of the Social Security Act (42 U.S.C. 1396p) is amended by redesignating subsection (e) as subsection (f) and by inserting after subsection (d) the following new subsection:

``(e)(1) In order to meet the requirements of this section for purposes of section 1902(a)(18), a State shall require, as a condition

[[Page 120 STAT. 63]]

for the provision of medical assistance for services described in subsection (c)(1)(C)(i) (relating to long-term care services) for an individual, the application of the individual for such assistance (including any recertification of eligibility for such assistance) shall disclose a description of any interest the individual or community spouse has in an annuity (or similar financial instrument, as may be specified by the Secretary), regardless of whether the annuity is irrevocable or is treated as an asset. Such application or recertification form shall include a statement that under paragraph (2) the State becomes a remainder beneficiary under such an annuity or similar financial instrument by virtue of the provision of such medical assistance.

``(2)(A) <<NOTE: Notification.>> In the case of disclosure concerning an annuity under subsection (c)(1)(F), the State shall notify the issuer of the annuity of the right of the State under such subsection as a preferred remainder beneficiary in the annuity for medical assistance furnished to the individual. Nothing in this paragraph shall be construed as preventing such an issuer from notifying persons with any other remainder interest of the State's remainder interest under such subsection.

``(B) In the case of such an issuer receiving notice under subparagraph (A), the State may require the issuer to notify the State when there is a change in the amount of income or principal being withdrawn from the amount that was being withdrawn at the time of the most recent disclosure described in paragraph (1). A State shall take such information into account in determining the amount of the State's obligations for medical assistance or in the individual's eligibility

for such assistance.

“(3) The Secretary may provide guidance to States on categories of transactions that may be treated as a transfer of asset for less than fair market value.

“(4) Nothing in this subsection shall be construed as preventing a State from denying eligibility for medical assistance for an individual based on the income or resources derived from an annuity described in paragraph (1).”.

(b) Requirement for State To Be Named as a Remainder Beneficiary.--Section 1917(c)(1) of such Act (42 U.S.C. 1396p(c)(1)), is amended by adding at the end the following:

“(F) For purposes of this paragraph, the purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless--

“(i) the State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant under this title; or

“(ii) the State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.”.

(c) Inclusion of Transfers To Purchase Balloon Annuities.--Section 1917(c)(1) of such Act (42 U.S.C. 1396p(c)(1)), as amended by subsection (b), is amended by adding at the end the following:

“(G) For purposes of this paragraph with respect to a transfer of assets, the term ‘assets’ includes an annuity purchased by or on behalf of an annuitant who has applied for medical assistance

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with respect to nursing facility services or other long-term care services under this title unless--

“(i) the annuity is--

“(I) an annuity described in subsection (b) or (q) of section 408 of the Internal Revenue Code of 1986; or

“(II) purchased with proceeds from--

“(aa) an account or trust described in subsection (a), (c), or (p) of section 408 of such Code;

“(bb) a simplified employee pension (within the meaning of section 408(k) of such Code); or

“(cc) a Roth IRA described in section 408A of such Code; or

“(ii) the annuity--

“(I) is irrevocable and nonassignable;

“(II) is actuarially sound (as determined in

accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration); and

“(III) provides for payments in equal amounts during the term of the annuity, with no deferral and no balloon payments made.”.

(d) <<NOTE: 42 USC 1396p note.>> Effective Date.--The amendments made by this section shall apply to transactions (including the purchase

of an annuity) occurring on or after the date of the enactment of this Act.

SEC. 6013. APPLICATION OF ``INCOME-FIRST'' RULE IN APPLYING COMMUNITY SPOUSE'S INCOME BEFORE ASSETS IN PROVIDING SUPPORT OF COMMUNITY SPOUSE.

(a) In General.--Section 1924(d) of the Social Security Act (42 U.S.C. 1396r-5(d)) is amended by adding at the end the following new subparagraph:

``(6) Application of `income first' rule to revision of community spouse resource allowance.--For purposes of this subsection and subsections (c) and (e), a State must consider that all income of the institutionalized spouse that could be made available to a community spouse, in accordance with the calculation of the community spouse monthly income allowance under this subsection, has been made available before the State allocates to the community spouse an amount of resources adequate to provide the difference between the minimum monthly maintenance needs allowance and all income available to the community spouse.'`.

(b) <<NOTE: 42 USC 1396r-5 note.>> Effective Date.--The amendment made by subsection (a) shall apply to transfers and allocations made on or after the date of the enactment of this Act by individuals who become institutionalized spouses on or after such date.

SEC. 6014. DISQUALIFICATION FOR LONG-TERM CARE ASSISTANCE FOR INDIVIDUALS WITH SUBSTANTIAL HOME EQUITY.

(a) In General.--Section 1917 of the Social Security Act, as amended by section 6012(a), is further amended by redesignating subsection (f) as subsection (g) and by inserting after subsection (e) the following new subsection:

``(f)(1)(A) Notwithstanding any other provision of this title, subject to subparagraphs (B) and (C) of this paragraph and paragraph (2), in determining eligibility of an individual for medical assistance with respect to nursing facility services or other long-term care services, the individual shall not be eligible for such assistance

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if the individual's equity interest in the individual's home exceeds \$500,000.

``(B) A State may elect, without regard to the requirements of section 1902(a)(1) (relating to statewideness) and section 1902(a)(10)(B) (relating to comparability), to apply subparagraph (A) by substituting for `\$500,000', an amount that exceeds such amount, but does not exceed \$750,000.

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``(C) The dollar amounts specified in this paragraph shall be increased, beginning with 2011, from year to year based on the percentage increase in the consumer price index for all urban consumers (all items; United States city average), rounded to the nearest \$1,000.

``(2) Paragraph (1) shall not apply with respect to an individual if--

``(A) the spouse of such individual, or

``(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program

established under title XVI) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1614,

is lawfully residing in the individual's home.

“(3) Nothing in this subsection shall be construed as preventing an individual from using a reverse mortgage or home equity loan to reduce the individual's total equity interest in the home.

“(4) <<NOTE: Procedures.>> The Secretary shall establish a process whereby paragraph (1) is waived in the case of a demonstrated hardship.”.

(b) <<NOTE: 42 USC 1396p note.>> Effective Date.--The amendment made by subsection (a) shall apply to individuals who are determined eligible for medical assistance with respect to nursing facility services or other long-term care services based on an application filed on or after January 1, 2006.

SEC. 6015. ENFORCEABILITY OF CONTINUING CARE RETIREMENT COMMUNITIES (CCRC) AND LIFE CARE COMMUNITY ADMISSION CONTRACTS.

(a) Admission Policies of Nursing Facilities.--Section 1919(c)(5) of the Social Security Act (42 U.S.C. 1396r(c)(5)) is amended--

(1) in subparagraph (A)(i)(II), by inserting “subject to clause (v),” after “(II)”; and

(2) by adding at the end of subparagraph (B) the following new clause:

“(v) Treatment of continuing care retirement communities admission contracts.--Notwithstanding subclause (II) of subparagraph (A)(i), subject to subsections (c) and (d) of section 1924, contracts for admission to a State licensed, registered, certified, or equivalent continuing care retirement community or life care community, including services in a nursing facility that is part of such community, may require residents to spend on their care resources declared for the purposes of admission before applying for medical assistance.”.

(b) Treatment of Entrance Fees.--Section 1917 of such Act (42 U.S.C. 1396p), as amended by sections 6012(a) and 6014(a),

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is amended by redesignating subsection (g) as subsection (h) and by inserting after subsection (f) the following new subsection:

“(g) Treatment of Entrance Fees of Individuals Residing in Continuing Care Retirement Communities.--

“(1) <<NOTE: Applicability.>> In general.--For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this title, the rules specified in paragraph (2) shall apply to individuals residing in continuing care retirement communities or life care communities that collect an entrance fee on admission from such individuals.

“(2) Treatment of entrance fee.--For purposes of this

subsection, an individual's entrance fee in a continuing care retirement community or life care community shall be considered a resource available to the individual to the extent that--

``(A) the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;

``(B) the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and

``(C) the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community.''.

SEC. 6016. ADDITIONAL REFORMS OF MEDICAID ASSET TRANSFER RULES.

(a) Requirement To Impose Partial Months of Ineligibility.--Section 1917(c)(1)(E) of the Social Security Act (42 U.S.C. 1396p(c)(1)(E)) is amended by adding at the end the following:

``(iv) A State shall not round down, or otherwise disregard any fractional period of ineligibility determined under clause (i) or (ii) with respect to the disposal of assets.''.

(b) Authority for States To Accumulate Multiple Transfers Into One Penalty Period.--Section 1917(c)(1) of such Act (42 U.S.C. 1396p(c)(1)), as amended by subsections (b) and (c) of section 6012, is amended by adding at the end the following:

``(H) Notwithstanding the preceding provisions of this paragraph, in the case of an individual (or individual's spouse) who makes multiple fractional transfers of assets in more than 1 month for less than fair market value on or after the applicable look-back date specified in subparagraph (B), a State may determine the period of ineligibility applicable to such individual under this paragraph by--

``(i) treating the total, cumulative uncompensated value of all assets transferred by the individual (or individual's spouse) during all months on or after the look-back date specified in subparagraph (B) as 1 transfer for purposes of clause (i) or (ii) (as the case may be) of subparagraph (E); and

``(ii) beginning such period on the earliest date which would apply under subparagraph (D) to any of such transfers.''.

(c) Inclusion of Transfer of Certain Notes and Loans Assets.--Section 1917(c)(1) of such Act (42 U.S.C. 1396p(c)(1)), as amended by subsection (b), is amended by adding at the end the following:

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``(I) For purposes of this paragraph with respect to a transfer of assets, the term `assets' includes funds used to purchase a promissory note, loan, or mortgage unless such note, loan, or mortgage--

``(i) has a repayment term that is actuarially sound (as determined in accordance with actuarial publications of the Office of the Chief Actuary of the Social Security Administration);

``(ii) provides for payments to be made in equal amounts during the term of the loan, with no deferral and no balloon payments made; and

``(iii) prohibits the cancellation of the balance upon the death of the lender.

In the case of a promissory note, loan, or mortgage that does not satisfy the requirements of clauses (i) through (iii), the value of such note, loan, or mortgage shall be the outstanding balance due as of the date of the individual's application for medical assistance for services described in subparagraph (C).''.

(d) Inclusion of Transfers To Purchase Life Estates.--Section 1917(c)(1) of such Act (42 U.S.C. 1396p(c)(1)), as amended by subsection (c), is amended by adding at the end the following:

``(J) For purposes of this paragraph with respect to a transfer of assets, the term `assets' includes the purchase of a life estate interest in another individual's home unless the purchaser resides in the home for a period of at least 1 year after the date of the purchase.''.

(e) <<NOTE: 42 USC 1396p note.>> Effective Dates.--

(1) In general.--Except as provided in paragraphs (2) and (3), the amendments made by this section shall apply to payments under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) for calendar quarters beginning on or after the date of enactment of this Act, without regard to whether or not final regulations to carry out such amendments have been promulgated by such date.

(2) Exceptions.--The amendments made by this section shall not apply--

(A) to medical assistance provided for services furnished before the date of enactment;

(B) with respect to assets disposed of on or before the date of enactment of this Act; or

(C) with respect to trusts established on or before the date of enactment of this Act.

(3) Extension of effective date for state law amendment.--In the case of a State plan under title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) which the Secretary of Health and Human Services determines requires State legislation in order for the plan to meet the additional requirements imposed by the amendments made by a provision of this section, the State plan shall not be regarded as failing to comply with the requirements of such title solely on the basis of its failure to meet these additional requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of the session is considered to be a separate regular session of the State legislature.